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Supreme Court U.S.
FILED
JAN 17 2007
OFFICE OF THE CLERK

No. 06-692

In the Supreme Court of the United States

LAURA GONZALEZ-VERA, ET AL., PETITIONERS

v.

HENRY KISSINGER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

JEFFREY BUCHOLTZ
Acting Assistant Attorney General

BARBARA L. HERWIG
ROBERT M. LOEB
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals erred by holding that petitioners' tort claims, based on the United States' alleged involvement in a coup in Chile and in subsequent events there during the 1970s, are not justiciable.

2. Whether the court of appeals erred by affirming the district court's dismissal of petitioners' tort claims based on the political question doctrine.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 449 F.3d 1260. The opinion of the district court (Pet. App. 12-35) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 2006. A petition for rehearing was denied on August 17, 2006 (Pet. App. 37-39). The petition for a writ of certiorari was filed on November 14, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns the United States' alleged involvement in a coup in Chile, and in subsequent events

there, during the 1970s. Petitioners are alleged victims (or relatives of alleged victims) of repression in Chile. Respondents are the United States and Dr. Henry Kissinger, who served as National Security Advisor and Secretary of State during the period at issue. Petitioners filed suit against respondents in the United States District Court for the District of Columbia, alleging various tort claims. The district court dismissed petitioners' claims, Pet. App. 12-35, and the court of appeals affirmed on the ground that petitioners' claims presented a nonjusticiable political question. *Id.* at 1-9.

1. As alleged in the complaint, the facts are as follows. In 1970, Salvador Allende, a Marxist, won a slight plurality of the vote in Chile's presidential election. Respondents provided support to members of the Chilean military who were planning a coup. Allende was eventually deposed in 1973 and replaced by Augusto Pinochet, a general in the Chilean army. The complaint alleges that, under Pinochet's regime, the Chilean government engaged in a variety of human-rights abuses directed at petitioners or their relatives. It further alleges that respondents aided the Chilean government's repressive conduct and failed to take any action to stop it. Pet. App. 2-3, 13-14.

2. On November 13, 2002—nearly 30 years after the alleged conduct—petitioners filed suit against respondents in the United States District Court of the District of Columbia.[1] Petitioners' complaint alleged that respondents had engaged in, *inter alia*, intentional infliction of emotional distress, cruel and inhuman treatment,

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[1] Petitioners also filed suit against Michael Vernon Townley, asserting that Townley served as an agent of the Chilean Directorate of National Intelligence. C.A. App. 11. Townley did not appear before the district court and is not a respondent before this Court.

false imprisonment, torture, and conduct resulting in wrongful death, in violation of federal, District of Columbia, and international law. Pet. App. 3, 12.

After the Attorney General certified that Kissinger was acting within the scope of his office or employment at the time of the incidents out of which the claims arose, the United States sought to be substituted as defendant on petitioners' claims against Kissinger pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), 28 U.S.C. 2679(d)(1). C.A. App. 169. Respondents then moved to dismiss petitioners' claims on the grounds, *inter alia*, (1) that the district court lacked jurisdiction under the political question doctrine; (2) that petitioners had failed to state a claim against the United States because the United States had sovereign immunity; and (3) that, even assuming that Kissinger was not immune from suit under the Westfall Act, petitioners had failed to state a claim against him. Pet. App. 3-4, 12-13.

3. The district court granted respondents' motion to dismiss. Pet. App. 12-35. Reasoning that "[t]he issue of whether this case is non-justiciable under the political question doctrine is a close one," *id.* at 17, the district court ultimately did not pass on respondents' contention that the case should be dismissed under that doctrine. The district court held, however, that petitioners' claims should be dismissed on other grounds. As to the claims against the United States, the district court determined that the United States was entitled to sovereign immunity. *Id.* at 20-22. As to the claims against Kissinger, the district court determined that Kissinger was entitled to immunity under the Westfall Act because he was acting within the scope of his employment at the time of the alleged incidents, *id.* at 22-29, and further determined

that, even assuming that Kissinger was not immune from suit under the Westfall Act, petitioners had failed to state a claim against him. *Id.* at 29-35.

4. The court of appeals unanimously affirmed on the ground that, under settled precedent, petitioners' claims presented a nonjusticiable political question. Pet. App. 1-9.

As a preliminary matter, the court of appeals rejected petitioners' contention that respondents were barred from invoking the political question doctrine because "Rule 12(b)(6) is a threshold procedural requirement that cannot include a determination of the merits of a claim." Pet. App. 4. The court reasoned that "[a] dismissal based upon the political question doctrine is not an adjudication on the merits." *Id.* at 5. Instead, the court explained, the political question doctrine is a "jurisdictional limitation[] imposed upon federal courts by the 'case or controversy' requirement of Art[icle] III." *Ibid.* (quoting *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974) (brackets in original)).

The court of appeals proceeded to hold that the political question doctrine was applicable. Pet. App. 5-9. At the outset, the court of appeals noted that, in *Baker* v. *Carr*, 369 U.S. 186 (1962), this Court enumerated six factors that would render a case nonjusticiable under the political question doctrine:

> [1] [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the

> respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217; see Pet. App. 6-7.

The court of appeals agreed with respondents that this case was indistinguishable from *Schneider* v. *Kissinger*, 412 F.3d 190 (D.C. Cir. 2005), cert. denied, 126 S. Ct. 1768 (2006), in which the court of appeals had dismissed materially identical claims under the political question doctrine on the ground that the first four factors articulated by this Court in *Baker* were satisfied. Pet. App. 7. The court of appeals noted that "[petitioners] have alleged and challenged drastic measures taken by [respondents] in order to implement United States policy with respect to Chile," and further noted that "[f]or the court to evaluate the legal validity of those measures would require us to delve into questions of policy textually committed to a coordinate branch of government." *Ibid.* (internal quotation marks and citation omitted). The court reasoned that "[i]t is of no moment that the acts alleged in this case," unlike the acts alleged in *Schneider*, "took place after the coup." *Ibid.* As the court explained, "[b]oth types of actions, if they occurred, were inextricably intertwined with the underlying foreign policy decisions constitutionally committed to the political branches." *Id.* at 7-8 (internal quotation marks and citation omitted).

The court of appeals noted that it could "imagine a case in which a rogue agent commits an act so removed from his official duties that it cannot fairly be said to represent the policy of the United States." Pet. App. 8. The court concluded, however, that "this is not such a

case." *Ibid.* As in *Schneider*, the court reasoned, "[w]hatever Kissinger did as National Security Advisor or Secretary of State 'can hardly be called anything other than foreign policy.'" *Ibid.* (quoting *Schneider*, 412 F.3d at 199).

Finally, the court of appeals rejected petitioners' contention that, insofar as they were pursuing claims under the Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. 1350 note, those claims would not be subject to the political question doctrine. Pet. App. 9. The court reasoned that "such a claim, like any other, may not be heard if it presents a political question," and determined that "[petitioners] were unable to extricate their TVPA claims from the political question that permeates their complaint." *Ibid.*

5. The court of appeals denied a petition for panel rehearing and rehearing en banc without recorded dissent. Pet. App. 37-39.

ARGUMENT

1. Petitioners primarily contend (Pet. 14-30) that the court of appeals erred by holding that petitioners' tort claims were not justiciable under the political question doctrine. As the court of appeals unanimously held, the claims in this case are not materially distinguishable from the claims in *Schneider* v. *Kissinger*, 412 F.3d 190 (D.C. Cir. 2005). See Pet. App. 7. This Court recently denied certiorari on a petition challenging the application of the political question doctrine in that case, see 126 S. Ct. 1768 (2006) (No. 05-743), and the same result is warranted here. The decision of the court of appeals involves only the fact-bound application of settled law, and does not conflict with any decision of this Court or of another court of appeals.

a. The court of appeals correctly concluded that this case should be dismissed under the political question doctrine. In *Baker* v. *Carr*, 369 U.S. 186 (1962), this Court enumerated six factors that would render a case nonjusticiable under that doctrine. *Id.* at 217. The Court made clear that a case could properly be dismissed under the political question doctrine even if only *one* of those factors was satisfied. See *ibid.* In this case, at least *four* of the *Baker* factors were satisfied.

Petitioners' claims concern the alleged involvement of American officials in a coup in Chile, and in subsequent events there, during the 1970s. Adjudicating those claims would necessarily require a Court to evaluate the reasonableness of decisions by the President and other Executive Branch officials to support the overthrow of a Marxist-led government in Chile and later to support the Pinochet regime. As the government explained in its brief in opposition in *Schneider* (05-743 Br. in Opp. at 9), it is clear that adjudication of petitioners' claims would implicate the constitutional commitment of the conduct of our Nation's foreign relations to the Executive and Legislative Branches; that there are no judicially discoverable or manageable standards for the adjudication of petitioners' claims; that the adjudication of petitioners' claims would necessarily involve a policy determination of a kind clearly for nonjudicial discretion; and that it would be impossible to adjudicate those claims without expressing a lack of respect for the Executive and Legislative Branches. *Baker*, 369 U.S. at 217; see *Schneider*, 412 F.3d at 194-198.

Like the petitioners in *Schneider*, petitioners here do not expressly contend that the decision of the court of appeals conflicts with any decision of this Court or another court of appeals. Instead, they merely contend

that there is "confusion and disarray in the lower federal courts" concerning the application of the political question doctrine. Pet. 3. Petitioners, however, do not identify any case involving the political question doctrine (other than this one) that they believe was incorrectly decided. Instead, the various cases cited by petitioners (*ibid.*) stand only for the unremarkable proposition that, in some cases, federal courts have concluded that the political question doctrine precludes judicial resolution of claims touching on foreign-policy and national-security concerns, and, in other cases, they have concluded that it does not. The differing results in those cases are wholly consistent with the principle that the political question doctrine requires a "case-by-case inquiry." *Baker*, 369 U.S. at 211; see generally 13A Charles A. Wright et al., *Federal Practice and Procedure* § 3534, at 454 (2d ed. 1984) (noting that "application of the political question tests of [*Baker*] is * * * highly individualized").

b. Petitioners contend (Pet. 18) that "[c]ongressional legislation reaffirms the United States' prohibition against torture and provides judicially manageable standards." But by enacting statutes such as the Torture Victim Protection Act (TVPA), Congress did not somehow preclude the application of the political question doctrine to claims under those statutes. A typical claim under the TVPA, for example, does not implicate the political question doctrine, insofar as such a claim involves an allegation that a *foreign* official engaged in torture or extrajudicial killing under color of *foreign* law. See 28 U.S.C. 1350 note; cf. Pet. App. 9 (noting that "[w]e need not quarrel with the plaintiffs' assertion that certain claims for torture may be adjudicated in the federal courts as provided in the TVPA"). The claims in

this case, by contrast, focus primarily on the failure by the American government to assert greater pressure on the Pinochet regime—and allege that, by virtue of that failure, the American government is culpable for the alleged abuses of that regime. See, *e.g.*, *id.* at 34 (listing allegations from complaint). The court of appeals correctly concluded that, where (as here) a plaintiff's claims under the TVPA (or similar statutes) would "require [the court] to delve into questions of policy textually committed to a coordinate branch of government," *id.* at 8 (internal quotation marks and citation omitted), the political question doctrine precludes consideration of those claims, just as it does in other contexts. *Id.* at 9.

2. Petitioners also contend (Pet. 10-14) that the court of appeals erred by characterizing the political question doctrine as "jurisdictional." This Court recently denied certiorari on a petition raising that issue as well, see *Bancoult* v. *McNamara*, No. 06-502 (Jan. 16, 2007), and it should do likewise here.

This Court has characterized the political question doctrine as an aspect of "the concept of justiciability, which expresses the jurisdictional limitations imposed upon federal courts by the 'case or controversy' requirement" of Article III of the Constitution. *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974). The Court has explained that "the presence of a political question suffices to prevent the power of the federal judiciary from being invoked by the complaining party." *Ibid.*; see *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (noting that the political question doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution" to the political branches). The

court of appeals' description of the political question doctrine as "jurisdictional" was therefore entirely consistent with this Court's own description of the doctrine. Pet. App. 5.

More broadly, however, it is irrelevant for present purposes whether the political question doctrine is properly described as "jurisdictional" in nature. In this case, the court of appeals merely affirmed the district court's dismissal of petitioners' action on the alternative ground that petitioners' claims were nonjusticiable under the political question doctrine. Pet. App. 5. It is indisputable that a district court could dismiss a case based on the political question doctrine, regardless whether such a dismissal is characterized as "jurisdictional" or merely prudential. Moreover, petitioners do not contend more specifically that it was inappropriate for the court of appeals to determine that petitioners' claims were nonjusticiable under the political question doctrine *before* considering whether petitioners' claims should be dismissed on other grounds. To the extent that those other grounds are merits-based, see, *e.g.*, *id.* at 29-35, such a contention would in any event lack merit.[2]

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[2] To the extent that those other grounds are jurisdictional, this Court has already held that a question concerning a doctrine that is "designed not merely to defeat the asserted claims, but to preclude judicial inquiry" can be decided before a jurisdictional question. *Tenet* v. *Doe*, 544 U.S. 1, 7 n.4 (2005). Because the political question doctrine is precisely such a doctrine, the petition in this case need not be held pending this Court's decision in *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, No. 06-102 (argued Jan. 9, 2007). That case presents the issue whether a district court must first establish jurisdiction before dismissing a suit on the ground of *forum non conveniens*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

JEFFREY BUCHOLTZ
Acting Assistant Attorney General

BARBARA L. HERWIG
ROBERT M. LOEB
Attorneys

JANUARY 2007